IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	2 CA-CR 2006-0383
Appellee,	)	DEPARTMENT B
	)	
v.	)	MEMORANDUM DECISION
	)	Not for Publication
ANGEL DOMINIC LOPEZ,	)	Rule 111, Rules of
	)	the Supreme Court
Appellant.	)	
	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20052757

Honorable Howard Fell, Judge Pro Tempore

AFFIRMED

Terry Goddard, Arizona Attorney General
By Randall M. Howe and Kathryn A. Damstra
Tucson
Attorneys for Appellee

Leonardo and Roach, LLC
By Nathan Leonardo
Tucson
Attorneys for Appellant

E C K E R S T R O M, Presiding Judge.

¶1 After a three-day bench trial, the court found Angel Dominic Lopez guilty of burglary in the first degree, armed robbery, aggravated robbery, kidnapping, possession of burglary tools, and criminal trespass in the first degree. The court sentenced him to aggravated, concurrent prison terms on each count, the longest of which were fifteen-year terms. On appeal, Lopez contends he did not knowingly, voluntarily, and intelligently waive his right to a jury trial and that the trial court erred by denying his motion to suppress unduly suggestive and therefore unreliable identifications. He also argues the state presented insufficient evidence that he took any items from the victims, and therefore, claims he is entitled to a judgment of acquittal on the armed robbery count. Finding no error, we affirm.

Factual and Procedural Background

¶2 The victims, Jose, Alma, and their sixteen-year-old-daughter Melissa, awoke one morning in June 2005 to find intruders in their home. Before fleeing the residence, Jose saw, in the lit hallway, a man wearing khaki pants and a dark tee-shirt with a rifle slung across his chest. Three different intruders, including the man wearing khaki pants with the rifle, took turns guarding Melissa at gunpoint while the others ransacked the house. After moving Alma's purse from the entryway to the bathroom and taking her keys, the intruders fled from the house.

¶3 Two of the intruders, including the man wearing khaki pants, eventually entered another home, apparently to hide from the police. A resident of that home held the two men at gunpoint until police arrived. Police had also arrested two other individuals in

the vicinity of the first victims' house, one of whom had fired at an officer before he was captured. Shortly thereafter, police drove Jose and Melissa separately to where the suspects had been detained. When Melissa saw them, the suspects were in handcuffs and surrounded by police officers. Both Jose and Melissa identified Lopez, from his clothing and build, as the intruder who had the rifle slung across his chest. Neither Melissa nor Jose could identify all four suspects.

¶4 A Pima County grand jury indicted Lopez on seven charges related to the home invasions, including armed robbery. Before trial, Lopez moved to suppress Melissa's identification of him. After a hearing at which no evidence was presented, the trial court denied the motion based on the pleadings, arguments, and stipulated facts.

¶5 Before trial, Lopez and the other codefendants signed written waivers of their right to a jury trial. The court explained the waivers and briefly questioned the defendants, including Lopez, to determine whether they understood the consequences of executing such waivers. The prosecutor then stated on the record that she had agreed with defense counsel that the court could consider the waivers as a mitigating circumstance in the event the defendants were convicted of the charges. The court did not explore with Lopez whether the prosecutor's promise had affected Lopez's decision to waive his right to a jury trial.

¶6 The court found Lopez guilty of all but one of the charges. It also denied Lopez's post-trial motion for judgments of acquittal on the charges of armed robbery, aggravated robbery, and possession of burglary tools. This appeal followed.

Discussion

¶7 Lopez first argues he did not knowingly, voluntarily, and intelligently waive his right to a jury trial. The record shows that, after the trial court explained to Lopez the consequences of waiving a jury trial, he stated he wanted a bench trial. Nevertheless, Lopez now contends the court did not sufficiently explore with him the effect of the prosecutor's statement—that his waiver of this right could be considered in mitigation at sentencing—on his decision to waive a jury trial.[1] *See State v. Butrick*, 113 Ariz. 563, 565-66, 558 P.2d 908, 910-11 (1976) (right to trial by jury guaranteed by United States and Arizona constitutions; defendant's decision to waive it must be "voluntarily and intelligently made").

¶8 The state correctly observes that Lopez did not challenge either the intelligence or voluntariness of his waiver before the trial court and contends Lopez has therefore forfeited appellate review. Failure to raise an argument in the trial court "forfeits the right to obtain appellate relief except in those rare cases that involve 'error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial.'" *State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005), *quoting State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984).

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[1]The prosecutor stated: "And, Judge, just so it's all up front, I did tell all defense counsel that should the Court convict any of these defendants of anything, that you could use their willingness to do a bench trial as a mitigating circumstance for whatever you felt appropriate."

¶9 Our supreme court has emphasized that the defendant bears the burden of persuasion that fundamental error has occurred and that the error is prejudicial. *Henderson*, 210 Ariz. 561, ¶¶ 19, 26, 115 P.3d at 607-09. Although Lopez has fully briefed why he believes the trial court erred in failing to clarify the validity of his waiver, he has utterly failed to address why any such error was either fundamental or prejudicial to the outcome of his case.[2] Accordingly, he has failed to meet his burden of persuading us that the trial court fundamentally erred to his legal detriment when it found he had validly waived his right to a jury trial.

¶10 Lopez next argues the officers conducted an "unduly suggestive" identification procedure on the night of the incident, rendering unreliable the testimony of two victims who identified him as a perpetrator of the home invasion. To conform with the requirements of the Due Process Clause of the Fourteenth Amendment, pretrial identification procedures must be "conducted in a manner that is fundamentally fair and secures the suspect's right to a fair trial." *State v. Lehr*, 201 Ariz. 509, ¶ 46, 38 P.3d 1172, 1183 (2002), *citing Manson v. Brathwaite*, 432 U.S. 98, 114 (1977). To enforce that standard, our supreme court has required exclusion of identification testimony if the investigative procedure securing it was "unduly suggestive" *and* the resulting identification was "not reliable enough to avoid a substantial likelihood of misidentification." *Lehr*, 201 Ariz. 509, ¶ 46, 38 P.3d at 1183.

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[2]In his opening brief, Lopez did not acknowledge his failure to raise the issue in the trial court. Nor did he contend therein that any such error was either structural or fundamental. Lopez did not file a reply brief.

¶11 Lopez contends the identification procedure here was unduly suggestive because: (1) he was in handcuffs and surrounded by police officers with a spotlight on him at the time the two witnesses observed him; (2) neither witness was shown any person other than the persons the officers suspected; (3) neither witness was cautioned by the officers that the persons they would view might not have been involved in the incident; and (4) both witnesses testified that they believed they were going to be viewing the perpetrators of the home invasion before the identification procedure began. Although the state disputes that the procedure was unduly suggestive, it does not contest any of these underlying facts about the nature of the procedure.

¶12 Preliminarily, we observe that Lopez did not challenge Jose's identification of him below. Nor does he argue on appeal that the trial court's failure to suppress Jose's identification was fundamental error. *See Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607. Accordingly, we do not address that portion of his claim.

¶13 As a threshold matter, we acknowledge that "show-up" procedures, such as those conducted here, do not demonstrate that the eyewitness in question would be able to distinguish a suspect from other innocent persons of similar appearance. And we recognize that the inherently suggestive features of show-ups such as these—wherein the suspect is observed shortly after the crime while standing handcuffed between officers—create a risk that the witness might erroneously identify the "suggested" suspect. *See Brathwaite*, 432 U.S. at 114 (noting the potential "corrupting effect of the suggestive identification itself").

But our supreme court has also acknowledged the value of such procedures to law enforcement: they allow the police to conduct an identification while the witness has a fresh mental picture of the perpetrator and, in the event the witness indicates they have detained the wrong person, the show-up allows police to continue searching for another suspect while the trail is fresh. *See State v. McLoughlin*, 133 Ariz. 458, 462, 652 P.2d 531, 535 (1982).

¶14 For these reasons, controlling authority neither endorses nor condemns "show-ups" but rather requires us to address the ultimate reliability of a suggestive identification in light of certain relevant factors. Those factors are: (1) the witness's opportunity to view the perpetrator, (2) the witness's degree of attention, (3) the accuracy of the witness's description, (4) the witness's level of certainty, and (5) the time elapsed between the crime and the confrontation. *State v. Hicks*, 133 Ariz. 64, 67, 649 P.2d 267, 271 (1982). We review a trial court's ruling on the reliability of a challenged identification for a clear abuse of discretion. *Lehr*, 201 Ariz. 509, ¶ 46, 38 P.3d at 1183.

¶15 Here, applying the *Hicks* factors, we can conclude the trial court did not abuse its discretion when it implicitly found Melissa's identification of Lopez sufficiently reliable to consider it as evidence of Lopez's guilt. That identification occurred within an hour and a half of the crimes while her memory was still fresh. She spent a considerable amount of time with the perpetrators during the commission of the crime and testified that the intruder with "khaki pants . . . and . . . a rifle hanging with a strap" had been the one who had guarded

her while the others searched her home for drugs. She stated she was "almost positive" Lopez was that person.

¶16 In evaluating the reliability of that identification, the trial court was also entitled to consider that Melissa had viewed four suspects and had identified only two of the suspects she had observed—a fact that suggests she did not identify Lopez merely because police officers had detained him. Finally, we believe the reliability of Melissa's identification is enhanced by her willingness to specify the basis for her identification—that she identified Lopez because his clothing and build matched that of the perpetrator—not because she recalled his face.

¶17 Lopez asserts Melissa's identification was questionable because her various descriptions of the other intruders were conflicting, because she did not see Lopez's face, and because she never mentioned to the officers on the night of the incident that she could only identify Lopez from his clothing. But, in the absence of factors showing a "substantial likelihood of misidentification," such contentions go to the weight, not the admissibility, of Melissa's testimony. *Lehr*, 201 Ariz. 509, ¶ 46, 38 P.3d at 1183. And, once the identification evidence was admitted, Lopez was entitled to emphasize those weaknesses and the court was capable of giving the identification whatever weight it deemed appropriate. Accordingly, the trial court did not abuse its discretion in denying Lopez's motion to suppress the out-of-court identifications.

¶18 Finally, Lopez claims the state presented insufficient evidence to support his convictions for armed robbery and aggravated robbery.[3] When reviewing the sufficiency of evidence to support a criminal charge, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

¶19 Section 13-1902(A), A.R.S., provides as follows:

> A person commits robbery if in the course of taking any property of another from his person or immediate presence and against his will, such person threatens or uses force against any person with intent either to coerce surrender of property or to prevent resistance to such person taking or retaining property.

A person commits aggravated robbery if accomplices are present during the commission of a robbery. A.R.S. § 13-1903(A). When either the perpetrator of an offense or his accomplice commits the robbery while using, or threatening to use, a deadly weapon, the offense becomes armed robbery. A.R.S. § 13-1904(A)(1), (2); *see also State v. Anderson*, 210 Ariz. 327, ¶ 54, 111 P.3d 369, 384 (2005) ("A defendant need not personally use or threaten to use the deadly weapon if an accomplice does so."). "Accomplice liability attaches to 'all persons who participate in the commission of a crime . . . .'" *State v. Cordero*, 174 Ariz. 556, 559,

[3]Although Lopez moved for a judgment of acquittal after trial, he does not challenge the trial court's denial of that motion on appeal.

851 P.2d 855, 858 (App. 1992), *quoting State v. McNair*, 141 Ariz. 475, 480, 687 P.2d 1230, 1235 (1984).

¶20 Lopez does not challenge the sufficiency of the evidence that he was armed, that he had accomplices, or that he threatened the use of force against the victims. Rather, he contends the state presented no evidence that he, or his accomplices, were in the course of "taking" any property when invading the victims' home. In assessing the evidence presented, we emphasize that the use of force and the taking of property need not be simultaneous. "'[A] robbery may . . . be established when the use of force precedes the actual taking of property, so long as the use of force is accompanied with the intent to take another's property.'" *Anderson*, 210 Ariz. 327, ¶ 55, 111 P.3d at 384-85, *quoting State v. Comer*, 165 Ariz. 413, 421, 799 P.2d 333, 341 (1990). And, taking occurs when the perpetrator obtains "possession of or dominion over property, and does not require that the property be moved." *State v. Aro*, 188 Ariz. 521, 524, 937 P.2d 711, 714 (App. 1997).

¶21 Here, the state presented evidence that Lopez and his accomplices had used force to take property from the victims' home. Both Jose and Melissa saw the person they later identified as Lopez within their home, uninvited, brandishing a rifle. During the time Lopez held Melissa at gunpoint, she could hear his accomplices searching through her family's belongings. Neighbors who eventually captured Lopez and another accomplice found a set of keys belonging to Alma, Melissa's mother, near the scene of the capture. Finally, officers found Alma's purse on the bathroom floor—a purse she had previously left

in the entryway of the home. Although the evidence suggests Lopez and his accomplices did not find what they had come to take from the victims' residence, the trial court reasonably could conclude beyond a reasonable doubt that either Lopez or his accomplices used force to take Alma's car keys and exercise dominion over her purse.

¶22 Affirmed.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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PHILIP G. ESPINOSA, Judge

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GARYE L. VÁSQUEZ, Judge